Civil Revision Petition No.1578/1998
Murti Mandir Shri Shesh Bhagwan
Versus Smt.Ram Pyari Bai

Date of Order ::: 11/07/06

Hon'ble Mr. Justice Ajay Rastogi

Mr. D.K.Soral, for petitioner (decree holder-plaintiff)
Mr. Mahesh Sharma, for respondent (defendant No.5)

Instant revision petition has been filed by plaintiff decree holder against order dt.23/07/98 whereby application No.9/89 for execution of decree dt.24/11/78 in Civil suit No.23/76 (538/71) has been dismissed by Additional Munsif Magistrate No.1 (North) Kota.

Petitioner (decree holder) filed civil suit No.538/71 for permanent injunction and possession of a Kotri (room) situated in Fatehgarhi Kota. It was inter-alia pleaded in plaint that in a Matth situated in Fatehgarhi, Kota, an idol of Shri Shesh Bhagwan (plaintiff) is located; Fatehgari consisted of 15 bighas of land, a well, trees and plants and with surrounding boundary & parkota besides Temple of Idol Shri Shesh and is situated aside Chambal River on west side thereof and boundary of Matthon is on north side; and open land owned, possessed, by Matth (plaintiff), where there was a Kotri (room) measuring 10 ft x 10 ft. having following boundaries : -

East : Frontage of Fatehgari

West : Samadhi

North : Parkota of Fatehgari

South : Open land.

It has also been averred in plaint that defendant No.2 (municipality) has no right to transfer,

alienate or sell any part of land of plaintiff but was being allotted & sold by Nagar Parishad Kota (defendant No.1) and hence decree was sought for perpetual injunction initially against defendant no.1 to 4 but despite injunction granted by trial Judge, defendant no.1 (municipality) allotted a Kotri in dispute to defendant No.4 & 5; as such amendment was sought in para 11 of plaint by way of addition thereof inter-alia averring that plaintiff's land surrounded by boundary to Kotri measuring 10 x 10ft alongwith its front Chabutri was allotted to defendant No.4 & 5 who were in its illegal possession, which should also be restored back to plaintiff. Amendment was allowed and para 11 was inserted to original plaint in the suit. Defendant no.5 (Ram Pyari) is respondent herein (judgment debtor).

After taking note of material and evidence adduced by both the parties during trial, learned Trial Judge allowed claim of petitioner plaintiff and vide judgment & decree dt.24/11/78, granted permanent injunction alongwith possession as sought for in suit by plaintiff. Relevant operative part of judgment (supra) granting permanent injunction and decree for having over possession in favour of plaintiff is reproduced as under : -

"1- कि प्रतिवादी सं-1 वादी की भूमि फतेहगढी वर्णित वाद मद सं- 2-1 व 2 तथा 3 की भूमि को किसी प्रकार आबंटित नहीं करे और न किसी को कब्जा देने की कार्यवाही करे और अन्य प्रतिवादी गण भी इसमें कोई सहायता नहीं करे

2- वादी द्वारा कब्जा प्राप्ति के लिए पैसा रूपया व न्याय शुल्क अदा करने पर वह वाद पत्र के मद सं 11 में वर्णित कोठरी का कब्जा प्रतिवादी सं 4 व 5 प्राप्त कर सकेगा"

Against judgment & decree, ibid, respondent (defendant No.5) filed regular first appeal No.70/82 which was dismissed by first appellate court (Addl.District Judge No.2, Kota) vide judgment dt.03/09/88 and thereafter filed civil second appeal No.91/89, that was also dismissed by this Court vide judgment dt.10/12/90.

Petitioner decree holder filed application for execution of decree (supra) under O.21 R.11, CPC, to which respondent defendant No.5 filed objection with regard to its maintainability as well as execution of the decree, itself and a specific objection was raised that since proper dimension of suit Kotri (room) which was added by way of amendment of para 11 in plaint, itself, has not been mentioned in the decree by trial Court; as such decree impugned is unexecutable. However, all such objections raised were over-ruled and application moved by respondent was rejected by executing Court vide order dt. 26/05/95.

However, separate application was also filed on 04/01/92 by respondent herein U/s 47, CPC, which too was rejected by Executing Court vide order dt.09/02/93, which was also assailed in civil revision petition No.353/93 which was dismissed by this Court vide order dt.04/12/96.

As a matter of substance, all objections raised pendente adjudication of dispute in regard to suit Kotri or at the stage of execution at the behest of respondent defendant No.5 were rejected by competent court of jurisdiction.

Be that as it may, pendente execution proceedings, on a report dt.05/10/95 submitted by

Sale Amin of the Court to the effect that there is no "Kotri" (room) in existence, the executing Court ultimately holding that there is no possibility to execute warrant of attachment for delivery of possession of suit "*Kotri*" (room) to plaintiff (decree holder) pursuant to decree in question, there remains nothing to further proceed in execution application No.9/89, which was ordered to be consigned to record vide order dt.23/07/98. Hence this revision petition.

Earlier suit was being prosecuted on behalf of Idol of Shri Shesh Bhagwan Mandir (plaintiff) through Mehant Shri Ram Charan Das who died pendente revision petition, hence in his place, Devendra Das alias Devi Shankar on filing application U/O.22 R.3 CPC was substituted as Mehant & Manager of plaintiff Idol/Murti Mandir of Shri Shesh Bhagwan vide order dt.20/09/04 of this Court.

Counsel for petitioner submits that since allotment was made by defendant No.1 (municipality) pendnte suit despite injunction granted by trial Judge in favour of plaintiff decree holder and that apart, when defendant No.5 was put in illegal possession, specific amendment sought in plaint, which was allowed and in para 11, ibid, there was specific mention of dimensions of suit "*Kotri*" measuring 10 ft x 10ft, despite objections raised thereto by all defendants including respondent herein, but no contrary statement of fact came on record pendente adjudication of dispute in the suit that no "*Kotri*" measuring 10ft x 10 ft was in existence – of which possession was sought by plaintiff decree holder in the suit, and once

learned Trial Court has passed judgment & decree under execution in question with a specific direction for restoration of possession from defendant Nos.4 & 5 including respondent herein; in such circumstances, improvement, if any, made of suit "*Kotri*" at later stage pendente lis, that will in no manner divest right of decree holder which accrued in his favour in terms of decree under execution which has attained finality upon rejection of first and second appeals preferred by respondent herein and in this view of matter, very order passed by Executing Court holding that there is no suit "K*otri*" in existence on the basis of report of Sale Amin is totally perverse and it has caused gross miscarriage of justice and despite a decree for possession for suit "Kotri" in favour of plaintiff issued way back in November, 1978 he has been deprived of fruits whereof.

Counsel for respondent supported finding recorded by executing Court under order impugned and further submits that if "*Kotri*" is not in existence as per report of Sale Amin, certainly decree qua it is unexecuteable and no error has been committed by learned Executing Court while passing order impugned.

On a specific question put to Counsel for respondent, as to whether there was any "*Kotri*" at the time when instant suit was amended and written statement was filed, he failed to dispute about existence of "*Kotri*". However, Counsel submits that since at later stage, improvement was made thereon and it was made of Pucca construction over the land allotted to respondent by defendant (municipality)

and in absence of amendment made in regard to possession of Pucca constructed room, according to Counsel for respondent, decree is not executable atleast in respect of "Kotri" in dispute once it being not in existence.

I have considered contentions of counsel for parties and with their assistance examined material on record. However, this fact remained not in dispute that suit "*Kotri*" measuring 10ft x 10ft with dimensions referred to in para 11 of plaint, itself, (which was inserted by way of amendment) was in existence pendente lis and despite temporary injunction granted by competent court of jurisdiction, land over which it was existing, since was allotted to respondent herein, she too was impleaded as defendant No.5, who at all stages, either before trial Court or first appellate court or even before this Court pendente civil second appeal, nowhere disputed with regard to existence of suit "*Kotri*" measuring 10ft x 10 ft. - dimensions whereof have been referred in amended para 11 of plaint and after the decree in respect thereto has attained finality and at the stage of execution, objection though raised by respondent herein about having raised pucca construction in form of room in place of "*Kotri*" as initially referred to in amended plaint, but was over ruled by competent court of jurisdiction. This fact can also not be disputed that objection raised by respondent herein initial by filing application U/s 47 CPC so also U/O.21 R.23 CPC all were rejected by Executing Court vide orders dt.09/02/93 and 26/05/95 and while rejecting such objections, Executing Court in its order dt.26/05/95

specifically recorded that possession of suit "*Kotri*" with dimensions referred to in para 11 of plaint was to be handed over to plaintiff decree holder.

In this view of matter, I find substance in contention made by Counsel for decree holder that if suit "*Kotri*" measuring 10ft.X10ft., as per dimensions referred to in para 11 of plaint remained in existence pendente lis and if it stood improved at the behest of parties to the suit by making construction of pucca room by either of respondent herein or else, that will not in any manner divest right of plaintiff in seeking execution of decree in question which attained finality upon dismissal of first and second appeals preferred at the instance of respondent herein, and merely because any improvement has been made by way of pucca construction in the form of room by respondent herein of suit "*Kotri*" measuring 10ft. X 10 ft with same dimensions as referred to in para 11 of amended plaint, was at her own risk and peril and it cannot be said that decree holder is not entitled for execution of decree in question on the basis of report of Sale Amin as there is no suit "*Kotri*" in existence with dimensions in question.

In my considered opinion, very finding recorded by Executing Court under order impugned while holding decree unexecuteable is totally perverse and accordingly deserves to be set aside.

Consequently, this revision petition succeeds and is hereby allowed; and Order dt.23/07/98 passed by Executing Court is set aside. The learned Executing Court is directed to get

decree executed in its true spirit in consonance with observations made above. Record be sent back to concerned court for compliance immediately.

(Ajay Rastogi), J.

K.Khatri/1578CRP1998